

United States Senate

WASHINGTON, DC 20510

January 9, 2018

The Honorable Michael J. Missal
Inspector General
U.S. Department of Veterans Affairs
Office of Inspector General
810 Vermont Avenue, NW
Washington, D.C. 20420

Dear Mr. Missal:

We write to urge the Office of the Inspector General (OIG) to investigate allegations of undue influence at the Department of Veterans Affairs (VA) to ensure compliance with federal ethics laws and regulations. Recently released emails confirm that Dr. Bruce Moskowitz, Attorney Marc Sherman, and Marvel Entertainment Chairman Ike Perlmutter—referred to as “the Mar-A-Lago trio”—advised and provided counsel to VA employees on contract, personnel, and policy decisions. We ask you to review whether the Mar-a-Lago trio are performing inherently governmental functions, and if so, whether they should be labeled special government employees. If they are performing such public responsibilities or functions, the trio would be required to disclose their financial interests to prevent conflicts of interest from guiding VA policies and operations.

An inherently governmental function must be performed by government personnel in order to protect public interests. A delineation for what the government must do and what contractors are allowed to do is established under OMB Circular No. A-76 and FAR Subpart 7.503(c). These policies articulate a clear list of examples of inherently governmental functions—some of which include determining agency policy, directing and controlling federal employees, hiring individuals for federal government employment, and engaging in federal procurement activities with respect to prime contracts.¹ Under these policies, the actions of the Mar-a-Lago crowd would be classified as government functions. An OIG review is necessary to understand if the trio should be held to the same federal conflict of interest laws and standards as government employees.

We ask that you review the Department of Justice’s “Memorandum Opinion for the Attorney General, Conflict of Interest, - Status of an Informal Presidential Advisor as a ‘Special Government Employee,’” in your investigation. According to this memo, when an individual who has a personal relationship with the President goes beyond their responsibilities as an informal advisor, that individual is “quite clearly engaging in governmental function.”² Likewise, if the individual is “working under the direction or supervision of the President”, they should be formally appointed as a “special government

¹ Office of Management and Budget. “OMB Circular A-76 Performance of Commercial Activities.” (Washington, D.C.) Executive Office of the President, Office of Management and Budget, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a76_incl_tech_correction.pdf; <https://www.acquisition.gov/content/7503-policy#i1118498>.

² Office of Legal Counsel, *Memorandum Opinion for the Attorney General: Conflict of Interest – Status of an Informal Presidential Advisor as a “Special Government Employee*, No. 77-9 (Feb. 24, 1977) https://www.justice.gov/sites/default/files/olc/opinions/1977/02/31/op-olc-v001-p0020_0.pdf.

employee”³ or a regular government employee if they are expected to serve more than 130 days in a 365 day period. Other factors to consider include if the person’s advice is solicited frequently, if their advice is sought by one official who may be a friend or impersonally by numerous people within the government agency, and if they take meetings during office hours.⁴

We are concerned that the findings in multiple ProPublica investigations indicate the trio went beyond their role as informal advisors and acted as government employees, while not being subjected to government ethics laws and standards. This is evident through their involvement in confidential contract negotiations for VA’s \$16 billion overhaul of its electronic health records (EHR) system. In December, ProPublica reported that the trio signed non-disclosure agreements—amended by Mr. Sherman—which enabled them to discuss the contract’s details with one another, the President, and other Administration officials.⁵ These new revelations run contrary to VA statements that the trio’s involvement in the contract was minimal. As VA has failed to provide adequate information regarding trio’s involvement during EHR negotiations, an independent review will help clarify the trio’s role in this multibillion dollar contract.

Furthermore, reports that VA personnel are seeking instruction from the Mar-a-Lago trio must be addressed to empower VA leadership to effectively carry out their responsibilities. The trio’s influence is evident by VA’s willingness to pursue an app to connect veterans with medical services at the request of Dr. Moskowitz. Recently released emails show that despite the redundancy and inaccuracies of Dr. Moskowitz’s proposal, VA carried out meetings, drafted memos, and organized a conference call with Apple prior to ultimately dropping his proposal. Likewise, the Washington Post reported that following Secretary Wilkie’s confirmation, former-Acting Secretary O’Rourke remained at VA per Mr. Perlmutter’s request.⁶ According to this report, Mr. Perlmutter contacted the President to find Mr. O’Rourke a new VA position to “reward his loyalty”—resulting in Mr. O’Rourke staying on VA’s payroll for four months before resigning. Mr. O’Rourke’s tenure at VA is marred by controversies and scandals. Veterans deserve a VA staffed by individuals motivated by a mission to care veterans—not those who pledge their allegiance to the trio.

We understand that the OIG will not investigate the trio for violations of the Federal Advisory Committee Act of 1972 given the pending lawsuit⁷; however, we believe an investigation is necessary to determine whether the Mar-a-Lago trio are performing inherently governmental functions. This will help assess if their financial interests should be disclosed in order to expose any conflicts of interest. Under 5 CFR 2635.101, government employees are required to, “place loyalty to the Constitution, laws, and ethical principles above private gain.”⁸ An investigation is necessary to ensure appropriate oversight, transparency, and accountability.

³ *Definitions, U.S. Code* 18, § 202(a).

⁴ Office of Legal Counsel, *Memorandum Opinion of the Attorney General*, 22.

⁵ Isaac Arnsdorf, “VA Shadow Rulers Had Sway Over Contracting and Budgeting,” *ProPublica* (2018), <https://www.propublica.org/article/va-shadow-rulers-had-sway-over-contracting-and-budgeting>.

⁶ Lisa Rein and Josh Dawsey, “Trump Loyalist At VA Forced Out After Collecting Pay But Doing Little Work,” *Washington Post* (Washington, D.C.), December 11, 2018, https://www.washingtonpost.com/politics/there-were-times-i-didnt-have-a-lot-to-do-trump-loyalist-at-va-forced-out-after-collecting-pay-but-doing-little-work/2018/12/11/26e4704a-fcb7-11e8-ad40-cdfd0e0dd65a_story.html?utm_term=.5d86a863080f

⁷ U.S. Department of Veterans Affairs Office of Inspector General Letter response to Offices of Senators Blumenthal and Brown, October 9, 2018, on file with Offices of Senators Blumenthal and Brown.

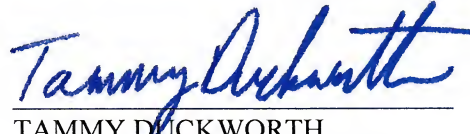
⁸ *Basic obligation of public service*, CFR 5, 2635.101.

Thank you for your consideration of this request. We look forward to hearing from you.

Sincerely,



RICHARD BLUMENTHAL
United States Senate



TAMMY DUCKWORTH
United States Senate



KIRSTEN GILLIBRAND
United States Senate



PATTY MURRAY
United States Senate



SHERROD BROWN
United States Senate